

Chas. J. ...
Chas. J. ...

THE UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER
WASHINGTON, D. C.

Chas. J. ...

Be the Superior Court of the United States

October Term 1894

SHIRLEY T. HIGH and JOHN W. HIGH
appellants.

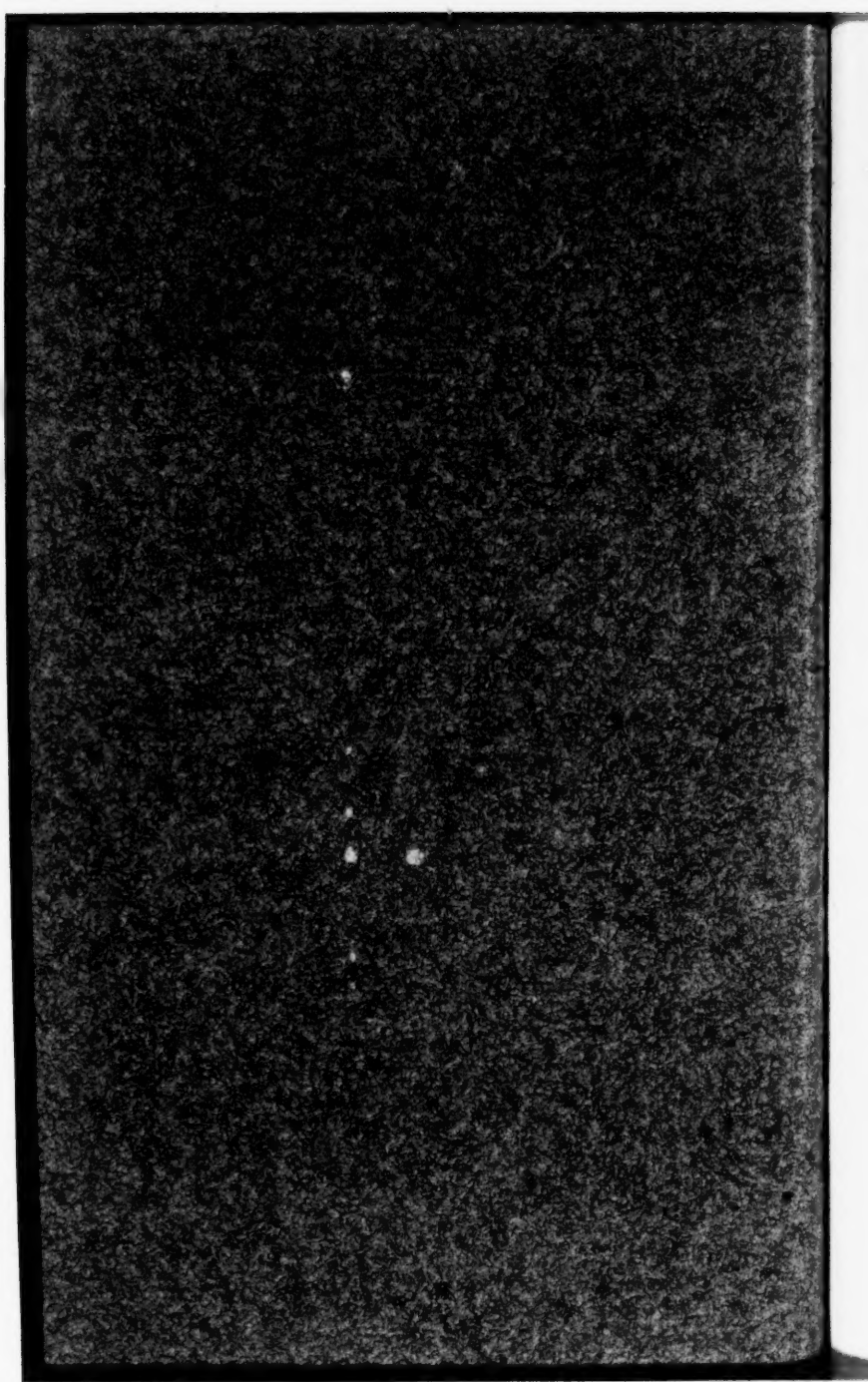
v.
T. E. COYNE, as executor of William No. 225
Estate, internal revenue for the first dis-
trict of Illinois, and Ellen T. High, as
executrix of James L. High, deceased.

First, PROPERTY MANAGEMENT TRUST, AND
First Trust Company, executor under the
will of Daniel Long, deceased, plaintiff in
error.

NGA41.

PERMANENT A. McCLAIN

BEFORE THE UNITED STATES
COLLECTORS



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH AND JESSIE M. HIGH, appellants, v. F. E. COYNE, AS COLLECTOR OF UNITED States internal revenue for the first district of Illinois, and Ellen T. High, as executrix of James L. High, deceased.	} No. 225.
--	------------

THE FIDELITY INSURANCE, TRUST, AND Safe Deposit Company, executor under the will of Daniel Craig, deceased, plaintiff in error, v. PENROSE A. McCLAIN.	} No. 451.
---	------------

BRIEF FOR THE UNITED STATES
COLLECTORS.

STATEMENT.

QUESTION.

The question raised is the constitutionality of the inheritance tax or duty provided by sections 29 and 30 of the act of June 13, 1898. (30 Stats., 448.)

THE CASES.

In case No. 225, two of the legatees of High, deceased, brought suit in the circuit court of the United States for the northern district of Illinois against the executrix and the collector of internal revenue ; against the former to restrain her from returning to the collector a statement of the legacies held by her as executrix, and from paying any tax thereon ; against the latter to enjoin him from collecting the tax. The circuit court (Seaman, judge), in an opinion (Rec., p. 10), sustained a demurrer to the bill. From this decree the appellants appealed to this court.

In case No. 451, the Fidelity Insurance, Trust and Safe Deposit Company, as executor under the will of Craig, deceased, brought suit in the common pleas court for the county of Philadelphia, against McClain (the collector of internal revenue) to recover back \$168.75, the tax assessed under this act. The case was removed to the circuit court of the United States for the eastern district of Pennsylvania, a demurrer to the petition sustained (Dallas and McPherson, judges, Rec., p. 13), and error sued out from this court.

In the petition and brief filed by this company in this court it is stated that the approximate Federal inheritance tax assessed against the company as executor and administrator of estates amounts to \$361,725.

THE LAW.

The following are the sections of the act involved, the italics being mine :

LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL PROPERTY.

SEC. 29. That *any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect, in possession or enjoyment, after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:*

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who dies possessed, as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who dies possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of a collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied

by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; *and every executor, administrator, or trustee, before payment and distribution to the legatee, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list,*

or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive

custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all

legal controversies where such deed or title shall be subject to judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth and that the requirements of the law had been complied with by the officers of the Government.

The foregoing sections (29 and 30) are identical in their provisions with sections 124 and 125 of the act of June 30, 1864 (13 Stats., pp. 285, 286), excepting the exemption to estates is raised from \$1,000 in actual value to \$10,000 in actual value, and the progressive rate, based on the value of the estate, contained in the concluding paragraph of section 29, is added. It is to be observed, therefore, that the provision for a graduated rate, based upon the rate fixed by the degree of consanguinity, may be rejected and an act taxing legacies and distributive shares be left complete in all its provisions. In other words, the present law is the old law in its entirety, as it was executed without objection from 1862 to 1870, with the addition of a progressive rate computed upon the rate fixed by consanguinity.

POINTS MADE AGAINST THE LAW.

The appellants in No. 225 contend:

1. The United States can not tax the right of inheritance which is created by the State. To permit this would be to permit the General Government to abridge or destroy a privilege lawfully conferred by the State.

2. The tax is direct and, being unapportioned, is unconstitutional because:

- (a) It purports to be upon the legacy or distributive share, and not upon the right to inherit or take by will.

(b) It does not fall within the definition of an "excise, duty, or impost."

3. If an excise, there is a lack of uniformity both because of the exemption created and in the classes defined.

The plaintiff in error in No. 451 contends:

1. Congress has no power to regulate inheritances within the States. The act must therefore be sustained as a valid exercise of the Federal taxing power.

2. The tax is not an excise upon the right to receive a legacy or distributive share measured by the amount received, but a tax upon the property in the hands of the executor or administrator, measured by the amount of the estate after paying debts, the rate increasing by a graduated scale, whereby estates are divided into six classes.

3. A tax imposed upon property as such, not being an excise upon the right to receive the legacy or distributive share, is a direct tax and must be apportioned.

4. If the tax be regarded as an excise, Congress has failed to follow the rule of uniformity by directing that the tax be levied in accordance with a graduated scale whereby the rate increases as estates pass from a lower to a higher class for assessment, the line of demarcation between the classes being simply a variation in the aggregate net amount of the estate of a decedent.

5. The rule of uniformity is not satisfied by a mere geographical uniformity. A uniform rate upon the same subject-matter, wherever situated, is necessarily involved.

6. To justify classification for taxation there must be substantial differences between the subject-matters which are placed in the several classes. While the courts will

not review a reasonable exercise of the legislative discretion, they have not hesitated to declare statutes void which, if upheld, would involve a fraud upon the power.

7. A classification, the only basis of which is that the unit of taxation is found with certain other units of specified number in a common ownership, is without reason—nay, more, it violates the fundamental American principle that the law makes no distinction between rich and poor.

POINTS MADE IN FAVOR OF THE LAW.

On behalf of the law, I submit:

1. Where the constitutionality of a law is involved, every possible presumption is in favor of its validity. A revenue act of Congress should not be lightly and unadvisedly set aside. The power to tax is the one great power upon which the whole national fabric is based.

2. The Constitution confers upon Congress the taxing power. With the exception and under the limitations of the Constitution, the taxing power reaches every subject of taxation.

3. In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in adjusting and distributing equitably the burdens of government. In so doing Congress has a right to recognize existing conditions. Rights, privileges, and facilities, however conferred, may be taxed if so enjoyed as to bring them properly within the cognizance of the Federal taxing power. It is not necessary that Congress should create the right or confer

the privilege in order to tax it. If enjoyed, it is enjoyed under the protection of the Nation as well as of the State.

4. The constitutionality of a law making an exaction for the purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

5. This exaction is not a direct tax upon the estate, but a duty or excise upon the right or privilege of the owner of property to transmit it on his death by will or descent to certain persons. This right or privilege, while not created or conferred by the United States, is enjoyed under its protection and may be taxed for the support of the Government. The executor, administrator, or trustee is made subject in the first instance to the payment of the duty, with a right to reimbursement in the settlement of his accounts. It is the passage, not the possession of property, which determines the duty. While the property is the subject of the assessment the privilege is the subject of the tax.

6. This excise is uniform because it operates with the same force and effect in every place where the subject of it is found. Wherever the privilege of transmitting an estate of a certain value to persons of a certain degree of consanguinity is enjoyed, the same duty is laid and collected. The classification of the privileges taxed made by the act is proper, because each class has an inherent characteristic which distinguishes it from the other classes and justifies the tax laid, namely, the value of the property transmitted and the degree of kinship of the persons to whom it goes.

ARGUMENT.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity. A revenue act of Congress should not be lightly or unadvisedly set aside. The power to tax is the one great power upon which the whole national fabric is based.

The rule to be followed where the validity of a Federal tax law is assailed is stated with clearness and force by Mr. Justice Peckham, speaking for the court in the case of *Nicol v. Ames* (173 U. S., 509, 514):

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. *The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.*

II.

The Constitution expressly confers upon Congress the taxing power. With the exception and under the limitations of the Constitution, the taxing power reaches every subject of taxation.

The power which Congress exercised in levying the tax now before the court is found in section 8 of Article I of the Constitution, which reads :

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Aside from the requirement of uniformity as to duties, imposts, and excises, the only limitations on the power of taxation contained in the Constitution are found in the fourth and fifth clauses of section 9 of Article I, which read :

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

The power to tax is an essential attribute of sovereignty. Without revenue, no government can exist. Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress. The breadth of the taxing power under our Constitution is well described by Mr. Chief Justice

Chase, speaking for the court, in the *License Tax Cases* (5 Wall., 462, 471):

The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

And, again, by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Company. v Soule* (7 Wall., 433, p. 443):

Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

Speaking of the character and extent of the power of taxation in the States, this court, Mr. Justice Field delivering the opinion, said in the case of the *State Tax on Foreign-held Bonds* (15 Wall., 300, 319):

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to

them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

III.

In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in adjusting and distributing equitably the burdens of government. In so doing, Congress has a right to recognize existing conditions. Rights, privileges, and facilities, however conferred, may be taxed if so enjoyed as to bring them properly within the cognizance of the Federal taxing power. It is not necessary that Congress should create the right or confer the privilege in order to tax it. If enjoyed, it is enjoyed under the protection of the Nation as well as of the State.

In the recent cases of *Magoun v. Illinois Trust and Savings Bank* (170 U. S., 283) and *Nicol v. Ames* (173 U. S., 509) such an elaborate presentation was made to the court of the cases upholding the right of Congress and the States, through classification, to select the subjects of taxation, and thus exercise a lawful discretion in

adjusting and distributing equitably the burdens of government, that it seems to me unnecessary to cite them here again.

The plaintiff in error in No. 451 contends that Congress has no power to regulate inheritances within the States, and the act must therefore be sustained as a valid exercise of the Federal taxing power. With this I am inclined to agree. But I wholly dissent from the position taken by the appellants in No. 225, that because the right of inheritance is the creature of the State, the General Government can not tax without unlawfully abridging or destroying it. In order that the United States should be able to tax a privilege, it is not necessary that the Federal Government should confer it; it is sufficient if the privilege exist. In the selection of subjects of taxation Congress has the right and it is its duty to recognize existing conditions. With the exceptions and under the limitations of the Constitution the Federal taxing power is absolute and supreme; it reaches every subject of taxation. Rights, privileges, and facilities, however conferred, may be taxed if so enjoyed as to bring them properly within the cognizance of the Federal taxing power.

In *Nicol v. Ames* (173 U. S., 509) it was insisted that the tax sustained in that case could not be upheld as a tax upon a privilege, because the seller on an exchange enjoys no privilege conferred by the Federal Government. Sales on an exchange within the limits of a State are subject to the regulation of a State. If any privilege is enjoyed, it is one either conferred by the State or enjoyed under its laws. The Federal Government giving nothing in the way of a privilege, it was contended it could charge

nothing in the way of a tax. The Government contended on the other hand that although the exaction could not be regarded as a price for a privilege conferred, it might properly be considered as a tax *on* a privilege enjoyed. Congress, in making the exaction, had in view the fact that the seller on an exchange or similar place enjoys peculiar privileges and facilities, which are of value, and may therefore be taxed. This view the court sustained, and in doing so, it seems to me settled conclusively that the United States may tax a privilege enjoyed although it does not confer that privilege.

The following extracts from the opinion of Mr. Justice Peckham, speaking for the court, are of interest in this connection (173 U. S., p. 516):

In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that *Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on.*

We think *the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act.* It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon the membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. (P. 519.)

In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. If it were to be assumed that taxes upon corporate franchises or privileges may be imposed only by the authority that created them, it does not follow that no privilege or facility can be taxed which is not created by the government of a State or by Congress. *In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should be created by the Government.* (P. 521.)

A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. *Although not created by Government, this privilege or*

facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. (P. 521.)

A class separated from the rest of the community through the enjoyment of lucrative privileges, from whatever source received, may be selected by Congress for special taxation, not because the United States conferred the privilege, but because, among other things, through having them such persons are better able to stand a tax. It is in this way that an equality of burdens is maintained. The changing conditions in business and in society, through continual commercial development, are constantly creating new classes which Congress makes use of in equalizing the burdens of government. The war-revenue act is full of illustrations of this truth.

For instance, the second section imposes certain special taxes. It lays taxes on bankers, not simply on national banks, but on State banks and private banks, which receive their privileges and franchises from the States. The banks are recognized as an existing class, enjoying certain privileges, however conferred, and therefore able to pay a special contribution to the Government.

The same section (par. 2) taxes stockbrokers; (par. 3) pawnbrokers; (par. 4) commercial brokers; (par. 5) custom-house brokers. These are occupation taxes, not levied because the Government has a right to regulate these callings, but because the business justifies the exaction of a special contribution.

The same section (par. 6) levies a tax on proprietors of theaters, museums, and concert halls; not on all proprietors of such places, but only those in cities having more than 25,000 population. Theaters, museums, and concert halls in cities situated in the States are under the police power of the States, which is usually exercised by the municipalities. Ordinarily the municipalities require such places to pay a license tax, which has been sustained by the State courts on the ground, partly, that the State has the power to regulate such places and therefore to tax them. Congress, which has no power to regulate them, taxes them simply because it regards them as proper existing subjects of taxation.

Under this same act special taxes are levied upon insurance—life, marine, fire, casualty, and guaranty—with exemptions in favor of fraternal, beneficiary, and cooperative organizations. The business of insurance is peculiarly within the control and regulation of the States, yet the Government has and exercises the right to tax it, and in taxing to classify and exempt.

I might go through this act and the tax laws of the United States in further illustration of this principle.

In short, though a privilege be received from a State, it is enjoyed under the protection of the United States as well as that of the State. The maintenance of the National Government is essential to the preservation of the States and the protection of the rights of person and property enjoyed by the citizens of the States, who are also citizens of the United States. Congress taxes the people of the State because the General Government is one formed by the people of the United States and pledged to provide

for their common defense and general welfare. The people, their property, their privileges, their occupations, their business, their transactions, and acts may all be taxed, because they all exist under the protection of the General Government and receive the benefits flowing from it.

IV.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

In determining whether a taxing law is constitutional or not it is first necessary to ascertain its operation and effect in the light of the entire act. The form of the act is not the essential thing. In construing a tax law the court will keep in view the reason of the law, and give the law a construction which will comport with the intention of the enacting power.

Thus, in the *License Tax Cases* (5 Wall., 462), it was conceded that Congress could not grant a license to traffic in liquor within the States, because such authority is vested in the States; yet the Federal law in words provided for the issuance of a license, and made it a misdemeanor to engage in the liquor business without first paying the special tax and obtaining a license. This court upheld the law upon the ground that what the statute called a license, was in effect and operation a tax, which Congress had the right to levy upon the liquor business.

Mr. Chief Justice Chase, who delivered the opinion, says (p. 471):

The power to tax is not questioned, nor the power to impose penalties for nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing the tax, and of implying nothing except that the licensee shall be subject to no penalties under national law if he pays it.

V.

This exaction is not a direct tax upon the estate, but a duty or excise upon the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons. This right or privilege, while not created or conferred by the United States, is enjoyed under its protection and may be taxed for the support of the Government. The executor, administrator, or trustee is made subject in the first instance to the payment of the duty, with a right to reimbursement in the settlement of his accounts. It is the passage, not the possession, of property which determines the duty. While the property is the subject of the assessment, the privilege is the subject of the tax.

It is contended that this is a direct tax because, by the language of the act, it does not appear to be an excise upon the right of inheritance or privilege of succession; that under the graduated scale the rate is not determined by the amount of the legacy or distributive share, but is based upon the value of the estate after paying the debts. It is therefore urged that the tax is one upon the property in the hands of the executor or administrator, and hence direct, and being unapportioned, violates the Constitution.

It may be conceded that a careful reading of the act does not lead to the conclusion that Congress intended to tax the privilege of receiving the legacy or distributive share, and thus plant itself upon the proposition that the duty is a price exacted from the legatee or distributee for a privilege conferred. Congress could not properly do so. It confers no privilege, and therefore can exact no price. The tax can not be sustained on the theory that it is a bonus paid for something enjoyed at the hands of the General Government.

The tax is nevertheless a tax upon a privilege. The decisions (see Appendix) are conclusive upon the point that in the transmission of an estate a privilege is enjoyed. The estate does not descend by common right, but by virtue of law. In the act of devolution a privilege is involved, and this privilege may be taxed. The exaction is not a direct tax upon the estate, but an excise upon the right or privilege of transmitting it. It is a duty upon the devolution of the estate, properly made payable by the executor, administrator, or trustee through whom the estate passes.

Sections 29 and 30 are an exact copy of sections 124 and 125 of the act of 1864 (13 U. S. Stats., 285, 286), with the exception of the exemption and the graduated scale, based on the value of the estate, and excepting that the word "collector" in section 30 was "assessor" in section 125. Let us examine their provisions with a view of determining what the exaction really is.

Section 29 provides "that any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from

personal property, * * * passing * * * from any person possessed of such property, either by will or by the interstate laws of any State or Territory, * * * to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows."

It is not the property which passes but the person or persons having the same in charge who, under this language, are made subject to the tax. The executor, administrator, or trustee is subjected in the first instance to a duty or tax determined by the value of the estate passing through his hands and the degree of relationship of the persons to whom it goes.

Section 30 provides "That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid" (observe, the lien is not on the property *of the legatees or distributees*), but the essential provision is that "every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector * * * the amount of the duty or tax assessed upon such legacy or distributive share." The executor, administrator, or trustee is required to make out a sworn statement or schedule of the legacies or distributive shares in his charge, giving the value thereof, the names of the persons entitled thereto, and the amount of the duty assessed thereon, which is to be "immediately delivered, and the tax thereon paid to such collector."

Upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators.

The twenty-ninth section makes the executor, administrator, or trustee subject to the tax on property which passes through his hands. The thirtieth section provides a method by which to collect the tax from him and authorizes him to reimburse himself at the hands of those who receive the property from him. He is required to furnish the collector with a statement of the legacies or shares in his charge, the duty assessable thereon, and to pay the tax to the collector, from whom he receives a receipt, which is warrant for the allowance of the payment in the settlement of his accounts in the State court.

If the executor, administrator, or trustee shall refuse to pay the duty or to deliver the sworn statement or make a false or incorrect statement, the collector shall make out the list and valuation and assess the duty.

And the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such

property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, * * * shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same.

Here is a provision for compelling the payment by the person in charge of an estate of the duty or tax, with the right to reimburse himself out of the property assessed. Suit is to be brought "against such person or persons as may have actual or constructive custody or possession of such property or personal estate." The suit is not brought against the legatees or distributees, or persons entitled to the estate. It is brought against those in charge—the executors, administrators, or trustees. The property of which the executor, administrator, or trustee has custody may be sold, the tax or duty with the costs of the suit paid out of the proceeds, and the balance held by the court "to be paid under its direction to such person or persons as shall establish title to the same."

Such are the provisions of the law.

It is not property in itself which is liable to the tax, but property "passing * * * either by will or by the intestate laws of any State or Territory;" it is not the ownership or possession of property which leads to the charge or imposition, but it is the descent or devolution of property; the burden, therefore, falls, not upon property, but upon the passage or transmission or devolution of property, and the duty is charged in the first instance upon the executor, or administrator, or trustee,

through whom the act of descent or devolution takes place.

Is such a tax, so laid and so collected, a direct tax upon property?

What a direct tax is found an elaborate discussion in the recent income tax case of *Pollock v. Farmers' Loan and Trust Co.* (157 U. S., 429; 158 U. S., 601). Before the decision of these cases, the trend of authorities limiting the meaning of a direct tax, as used in the Constitution, to a capitation tax and a tax on land. On the original submission of these cases, the court held that a tax on the rents or income of land is a tax on the land itself, and therefore a direct tax within the meaning of the Constitution. On the rehearing the court extended its definition of a direct tax so as to include a tax levied on personal property or the income thereof. Such is the extent to which the court went.

Mr. Edmunds argued against the income tax law. He gives the following definition of a direct tax (157 U. S., 491):

A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods, which he may import or not import, as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being.

Duties, imposts, and excises are, in large degree, and almost universally, heavy or light upon each person, depending upon his own will.

* * * * *

Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement.

In another place (p. 487) Mr. Edmunds speaks of indirect taxes as those "which are intended to fall upon the movement of commodities and the voluntary occupations of men."

In the opinion of the court, Mr. Chief Justice Fuller thus defines direct taxes (157 U. S., 558):

Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

Mr. Justice Field, in his concurring opinion, thus describes excise taxes (157 U. S., bottom p. 592):

Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them.

In the opinion on the rehearing, in discussing the meaning of the words "duties, imposts, and excises," used in the Constitution, Mr. Chief Justice Fuller, speaking for the court, says (158 U. S., 622):

Cooley (on Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax imposed on the importation, exportation, or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax tribute or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In *Pacific Insurance Co. v. Soule* (7 Wall., 433), Mr. Justice Swayne, speaking for the court, adopts the following definition of an excise tax (bottom p. 445):

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. (Citing Bateman's Excise Law, 96; Story's Const., sec. 953; 1 Blackstone's Com., 318.)

Congress, as an indication of the character of the tax, used in the act itself the word "duty," which, as appears by the citations I have made, ordinarily means an indirect tax or an excise. This tax comes within every definition on an indirect tax given in the quotations I have made from the Income Tax Cases.

It comes within Mr. Edmunds's definition. It is not levied on property with respect to itself or its income; it

falls upon the movement of property, upon its descent, its transmission, its devolution.

It comes within the definition of Mr. Justice Brown; it is not paid both immediately and ultimately by the taxpayer. It is paid immediately by the administrator, executor, or trustee. It is ultimately charged up against the estate, and so the burden either falls upon the legatee or distributee, or is foreseen and provided for by the testator or intestate. It is impossible to say that, under the operation of the act, the tax is paid by the legatee, for naturally the testator, in making his will, will take into consideration the tax, so the legatee will get all the testator intended to leave him after the tax is paid.

It comes within the definition of Mr. Chief Justice Fuller. It is not a tax paid primarily by a person who can not shift the burden upon some one else and who is under a legal compulsion to pay it. It is paid by the executor, who charges it against the estate and has it allowed in his settlement. But if regarded as a tax on the legatee or distributee, yet it is not a tax laid with respect to property which he owns. It is property in process of transmission to him, property which he does not have to take. If he does not want to pay the tax, he can leave the property. In fact, he never gets the whole property and pays the tax out of it. He only gets the property less the tax, so the tax is never levied upon any property he owns.

The practical operation of the statute—the real nature of the exaction—is what the court will look to in determining whether the tax is direct or not. Is it not absurd to jump to the conclusion that Congress would do

a wholly futile thing by levying an unapportioned tax upon personal property? Certainly Congress never intended to pass an act void and inoperative on its face. It was the design of Congress to pass a valid law, to lay a tax in accordance with the Constitution. This it could do by taxing the privilege of transmitting the property; it could not do so by taxing the property itself. The privilege of transmitting the property, whether by will or the intestate laws of any State or Territory, may be taxed either by the State or by the Federal Government. In either case the tax is an indirect tax—an excise—which does not have to be apportioned. The language of the court, speaking by Mr. Justice Peckham, in the case of *Nicol v. Ames* (173 U. S., 509, 515) is in point:

In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with

reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

VI.

This excise is uniform because it operates with the same force and effect in every place where the subject of it is found. Wherever the privilege of transmitting an estate of a certain value to persons of a certain degree of consanguinity is enjoyed, the same duty is laid and collected. The classification of the privileges taxed made by the act is proper, because each class has inherent characteristics which distinguish it from the other classes and justify the tax laid, namely, the value of the property transmitted and the degree of kinship of the persons to whom it goes.

The Constitution provides that "all duties, imposts, and excises shall be uniform throughout the United States." Conceding this exaction to be in the nature of an excise, opposing counsel assail it on the ground that it lacks uniformity. They insist there is no legal basis for the exemption made and the classes created by the law; that since the legacies or shares are assessed according to their value, the same rate should obtain whatever the value; that to exempt estates of \$10,000 or less, and to levy a graduated rate upon estates above \$10,000 in value, is to violate the law of uniformity; that such a classification, based upon the value of estates, is purely arbitrary and results in unequal and unfair discriminations against the larger in favor of the smaller estates.

In defining what the Constitution requires in the way of uniformity, Mr. Justice Miller, speaking for the court, said, in the *Head Money Cases* (112 U. S., 580, 594):

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. * * * Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax Cases*, 92 U. S., 575, 612.)

In the case of *Tappan v. Merchants' National Bank* (19 Wall., 490, 504), Mr. Chief Justice Waite, speaking for the court, said:

Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules can not be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all.

In order to equalize the burdens of taxation in accordance with its views of what will promote the general welfare, Congress must have the discretion to select and classify the subjects of taxation. In this respect Congress has the same power that the legislatures of the States exercise. Over and over again this court has sustained the power of classification when assailed under the fourteenth amendment.

In *Bell's Gap Railroad Co. v. Penna.* (134 U. S., 232, 237), the court, speaking by Mr. Justice Bradley, said:

We think we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would * * * render nugatory those discriminations which the best interests of society require.

In *Home Insurance Company v. New York* (134 U. S., 594, 606), Mr. Justice Field, speaking for the court, said:

But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate; distinguishing between franchises, licenses, and privileges and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation.

In *Pacific Express Company v. Siebert* (142 U. S., 339), Mr. Justice Lamar, in delivering the opinion, said, page 351:

This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.

It is true that to sustain a classification for purposes of taxation there must be some distinguishing characteristics in the created classes. In other words, classification can not be purely arbitrary without any basis in fact. As the court, speaking by Mr. Justice Brown, said in *Gulf, Colorado and Santa Fe Ry. v. Ellis* (165 U. S., 150, 165):

It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.

Or, as Mr. Justice Peckham, answering the objection that a classification for purposes of taxation was not uniform, put it, in *Nicol v. Ames* (173 U. S., 509, 521):

The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. (*Gulf, Colorado, etc., Railway v. Ellis*, 165 U. S., 150-155; *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 283, 294.) If the classification be proper and legal, then there is the requisite uniformity in that respect.

The question, then, in this case is, Is there any reasonable ground for the classification of the privileges defined and taxed by the act? The court will observe that I say privileges, not property. While the property may be the subject of the assessment, the privilege is the subject of

the tax. What the act classifies are certain privileges. Here they are.

The following six classes are based upon the degree of consanguinity:

Class.	Passing to—	Rate per \$100.
1	Husband or wife.....	Exempt.
2	Lineal issue or lineal ancestor, brother or sister.....	\$0.75
3	Descendant of a brother or sister.....	1.50
4	Brother or sister of father or mother, or descendant of brother or sister of father or mother.....	3.00
5	Brother or sister of grandfather or grandmother or descendant of brother or sister of grandfather or grandmother.....	4.00
6	Any other degree of collateral consanguinity or stranger in blood, or body politic or corporate.....	5.00

The following six classes are based on the amount of the estate, or property passing:

Class.	Amount of estate.	Rate per \$100.
1	\$10,000 and under.....	Exempt.
2	Exceeding \$10,000 to not exceeding \$25,000.	Rate fixed by consanguinity.
3	Exceeding \$25,000 to not exceeding \$100,000.	Rate multiplied by $1\frac{1}{2}$.
4	Exceeding \$100,000 to not exceeding \$500,000.	Rate multiplied by 2.
5	Exceeding \$500,000 to not exceeding \$1,000,000.	Rate multiplied by $2\frac{1}{2}$.
6	Exceeding \$1,000,000.....	Rate multiplied by 3.

I do not understand that the validity of the classification based upon the degree of consanguinity is seriously assailed. It seems to be conceded that Congress has the

power to create the six classes which I have first tabulated; the first class being exempt, the succeeding five being subject to rates varying according to the degree of kinship. The attack is made upon the classes which are set out in the second table, where the amount of the estate defines the privilege, determines whether it shall be taxed, and, if so, at what rate. It is the graduated rate or progressive tax which is strenuously assailed.

Admitting there must be a basis for classification, what is more characteristic of an estate, or the privilege of transmitting it, than its value. Every estate has value, and the right of transmitting it is esteemed, usually, simply because of its value. The objection, then, must be to the limitation of the classes defined. But the argument on the other side would prevent any definition of a class. It would prevent any exemption whatever. (See *Cope's Estate*, 191 Penna., 1.) It would require a uniform rate to be levied upon all estates, however small or however large. Of course it may be said that there is no real distinction between an estate valued at \$10,000 and one valued at \$10,001, and yet the first is exempt, while the latter is taxed. But there must be a line drawn somewhere, if you are going to classify anything. And the person or corporation or property on one side of the line will be entitled to certain privileges or subject to certain burdens, which the property or person or corporation on the other side of the line will not be, no matter how slight the difference. The sole argument is that a difference of one dollar puts an estate on one side or the other, while a difference of one dollar does not change the character of the estate.

And yet a difference of a dollar in a theft will keep a man from going to the penitentiary or send him there; a difference of a dollar in a matter involved in litigation will put a case in a certain court or keep it out; a difference of a day will enable a man to vote or prevent the exercise of that privilege. Innumerable instances of this sort might be cited, for in every direction governments have employed classification in the exercise of the power to regulate, to control, to tax; in short, to legislate.

In *Minot v. Winthrop* (162 Mass., 113), the court, discussing the objection that the Massachusetts tax on inheritance violated the rule of uniformity on account of the exemption of estates of \$10,000 and under, said, bottom page 123:

In all, or nearly all, systems of taxation there are some exemptions, but the objection here is that estates whose value, after payment of all debts, shall not exceed \$10,000 are exempt, without regard to the value of the property received by the devisees, legatees, heirs, or distributees. It is argued that the excise, if upon the privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same, in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. *But the right or privilege taxed can, perhaps, be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property.* The tax, too, has some of the characteristics of

a duty on the administration of estates. The cost of administering small estates is proportionately greater than that of administering large ones, and this of itself, particularly in intestate estates, operates to diminish the amounts received very much as a tax would. The statutes of the different States and nations which have levied taxes on devises, legacies, and inheritances have usually made exemptions, and these have sometimes related to the value of the estates and sometimes to the value of the property received by the heirs, devisees, legatees, or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates; but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.

In the recent case of *Magoun v. Illinois Trust and Savings Bank* (170 U. S., 283), the court sustained the validity of the Illinois inheritance tax, with its graduated rate, based upon the value of the inheritance received. Respecting the right to classify and impose a progressive tax on inheritances, Mr. Justice McKenna, speaking for the court, said, page 300:

That rule [the rule of equality] does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and may be graded according to the value of that inheritance. The condition is not arbitrary, because it is determined by that

value ; it is not unequal in operation because it does not levy the same percentage on every dollar ; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts ; the right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality ; nevertheless they are universally imposed and their legality has never been questioned.

It may be said that this court sustained the classification in the Illinois law because it was based on the value of the inheritance received, that the right to inherit was conferred by the State, and the State could annex to that right whatever condition, in the way of a contribution to the revenues of the State, it saw fit.

Concede the United States did not confer the right to inherit ; it has not attempted to annex a condition to it ; it has not graded the tax according to the amount of property received. In transmitting an estate a privilege is enjoyed. The act of devolution takes place by virtue of law. Recognizing the existence of this privilege, Congress has taxed it. In fixing the tax the classes of privileges enjoyed have been defined with reference to the amount or value of the entire property transmitted. This is entirely proper. The right or privilege taxed under this law is, as suggested in the Massachusetts case, "the right or privilege of the owner of

property to transmit it on his death, by will or descent, to certain persons." If a State may levy a progressive tax upon the right or privilege of legatees and distributees to inherit or succeed to property, may not Congress levy a progressive tax upon the right of the owner of property to transmit it on his death to his successors? In the former case the rate would be determined, of course, by the value of the legacy; in the latter case by the value of the estate.

But it may be said that a State, in the exercise of its power to regulate inheritances, may levy a progressive tax, while Congress, having no power to regulate inheritances, can not. This is as much as to say that Congress, in using the taxing power, can not keep in mind the public welfare and so levy its taxes as to promote that. Equality and uniformity as applied to legislation are synonymous terms. The equality guaranteed by the fourteenth amendment is as broad as the uniformity enjoined upon Congress in levying an excise tax. What does not violate one is not prohibited by the other. If a State can classify the privileges enjoyed in transmitting estates and tax these privileges by a progressive rate, preserving at the same time equality, the United States may do the same thing without violating the rule of uniformity.

In point of fact, what the supreme court of Ohio said in *State ex rel. v. Ferris* (53 Ohio St., 314) about the inheritance tax before it, applies to all such acts passed in this country, so far as I have been able to observe. In answer to an argument in favor of the Ohio law that it was

not purely for the raising of revenue, but for the regulation of the succession and transfer of property, the court said, page 340:

The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances, and if further regulation is desired purely as regulation, aside from revenue, it would most likely be sought in the amendment of those statutes. *The act is clearly one for taxation and not for regulation, as shown by its provisions and title.*

The Illinois law upheld by this court was clearly one for taxation and not for regulation. The higher rate levied on the larger estates was laid for the purpose of raising more money. The legislature properly thought that the smaller estates could not stand the rate which would prove no burden on the greater estates. The exemption was of an estate regarded as necessary for the support of the widow and children, which, in view of the cost of administering it, the legislature thought ought not to be taxed at all. All these considerations relate to taxation and may properly have induced Congress to make the classification and levy the progressive rate in the act under consideration. It is simply a question of equalizing the burdens of government—placing them where they will be least felt.

In the briefs many illustrations are given of the alleged inequality produced by applying to the small legacies the higher rates fixed by the large estates. If a rate fixed by a large estate is applied to a small legacy, and ultimately charged against the legacy, it is the

fault of the owner of the large estate. He can readily arrange matters in his will so as to relieve the smaller legacies from the burden of the tax.

CONCLUSION.

Much solicitude is expressed for the future of the Republic if the court sustains this law with its graduated scale. But the court has already sustained the progressive rate when applied by the States. Is the country therefore doomed? Will the "plain" people lose their interest in the Government if all the States do as Illinois has done, and tax the transmission of the great estates at a higher rate than the small ones? I have never heard the "plain" people complain because they are being deprived of the privilege of paying their share of the taxes. The common complaint is that they pay more than their share; that on listing day the stocks and bonds of the great estate go into hiding, while the horses and cattle and produce of the small estate can not escape the eye of the assessor. Death uncovers the great estate, discloses its investments, lays it open to taxation, gives Government a chance to even up. Perhaps that is one explanation of the higher rate on the great estate.

JOHN K. RICHARDS,

Solicitor-General.

DECEMBER 2, 1899.



APPENDIX.

FEDERAL CASES.

Mager v. Grima, 8 How., 490 (1850), Taney, C. J. Louisiana law sustained.

Bottom page 493:

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

Carpenter v. Commonwealth, 17 How., 456 (1854); Campbell, J.; Pennsylvania law sustained.

Page 462:

"But until the period of distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile, as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of donee are subordinate to the conditions, formalities, and administrative control, prescribed by the State in the interest of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If

the State during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it."

Scholey v. Rew, 23 Wall., 331 (1874); Clifford, J., Federal real estate succession tax.

Page 347:

"The succession or devolution of the real estate is the subject-matter of the tax or duty, * * * nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction."

Bottom page 348:

"The subject-matter of the assessment is the devolution of the estate or the right to become beneficially entitled to the same, &c."

United States v. Fox, 94 U. S., 315 (1876); Field, J.; under New York law, devise to United States void.

Page 320:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. (*McCormick v. Sullivan*, 10 Wheat., 202.)"

Clapp v. Mason, 94 U. S., 589 (1876); Hunt, J.; United States tax on successions construed.

Held: That the tax could not accrue until the successor became entitled to the possession of the estate. Since

such succession did not take effect until after the repeal of the act, the tax was wrongfully imposed.

Mason v. Sargent, 104 U. S., 689 (1881); *Matthews, J.*; United States tax on legacies construed.

Same holding with regard to the tax upon legacies, the same estate being involved.

Wallace v. Myers, 38 Fed. Rep., 184 (1889); *Wallace, J.*; New York tax on United States bonds sustained.

Page 185 :

"The statute exacts compensation in the form of a tax, and measures the price according to the value of the inheritance; and the purpose and effect of valuing the the bonds when they form a part of the decedent's estate is to ascertain and measure the value of the privilege. * * * *The bonds are the subject of the appraisal and the privilege is the subject of the tax.*"

United States v. Perkins, 163 U. S., 625 (1896); *Brown, J.*; New York tax on property bequeathed United States upheld.

Page 627 :

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and to the increase thereof, during his life, except so far as the State may require him to contribute his share for public expense, *the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control.*"

Page 628 :

"Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. *Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.*"

Page 629:

"That the tax is not a tax upon the property itself, *but upon its transmission by will or descent*, is also held, both in New York and in several other States" (citing cases).

Page 630:

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, *since the tax is upon the legacy before it reaches the hands of the Government*. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283 (1898); McKenna, J.; Illinois progressive tax upheld.

Page 287:

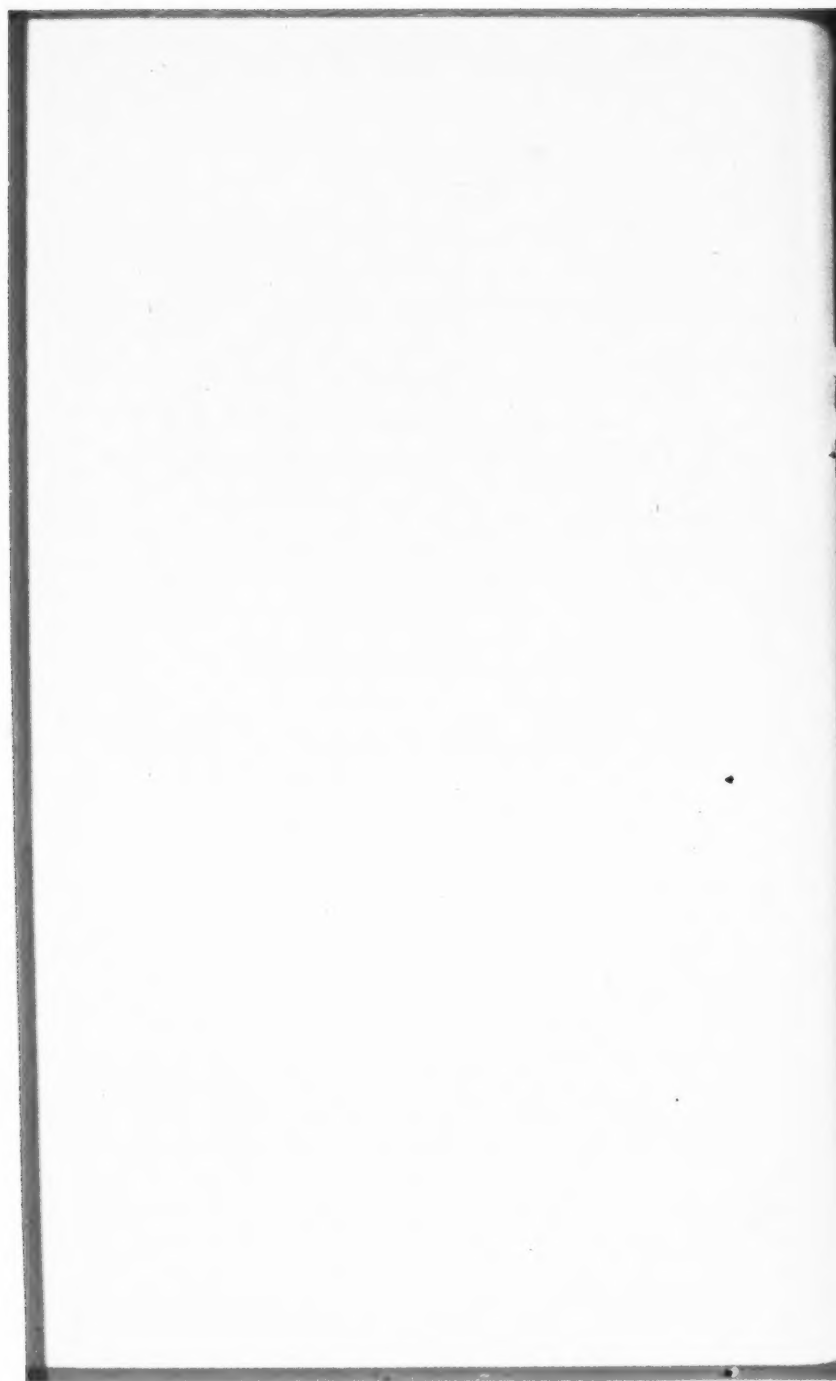
"Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and they have been enacted in other States. They are not new in the laws of other countries. In *State v. Abston* (94 Tennessee, 674), Judge Wilkes gave a short history of them as follows: 'Such taxes were recognized by the Roman law. Gibbon's *Decline and Fall of the Roman Empire*, vol. 1, pp. 163-164. They were adopted in England in 1780, and have been much extended since that date. Dowell's *History of Taxation in England*, 148; Acts 20 George III, c. 28; 45 George III, c. 28; 16 and 17 Victoria, c. 51; *Green v. Craft*, 2 H. Bl., 30; *Hill v. Atkinson*, 2 Merivale, 45. Such taxes are now in force generally in the countries of Europe. (Review of Reviews, February, 1893.) In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and, still more recently, in Connecticut, New Jersey, Ohio, Maine, and Massachusetts, 1891; Tennessee in 1891, chapter 25 now repealed by chapter 174, acts 1893.

They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reenacted in 1863, and repealed in 1884.' Other States have also enacted them, Minnesota by constitutional provision.

"The constitutionality of the taxes has been declared and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S., 625, 628; *Strode v. Commonwealth*, 52 Penn. St., 181; *Eyre v. Jacob*, 14 Grat., 422; *Schofield v. Lynchburg*, 78 Virginia, 366; *State v. Dalrymple*, 70 Maryland, 294; *Clapp v. Mason*, 94 U. S., 589; *In re Merriam's Estate*, 141 N. Y., 479; *State v. Hamlin*, 86 Maine, 495; *State v. Abston*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; *Dos Passos Collateral Inheritance Tax*, 20; *Minot v. Winthrop*, 162 Mass., 113; *Gelsthorpe v. Furnell* (Montana), 51 Pac. Rep., 267. See also *Scholey v. Rew*, 23 Wall., 331.

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation."





No. 2250.

Office Supreme Court U. S.
FILED

MAR 27 1900

JAMES M. McKENNEY,

Clerk.

Ad^d By of City (Richards)

on question propounded by Court

Filed Mar 7, 1900

In the Supreme Court of the United States.

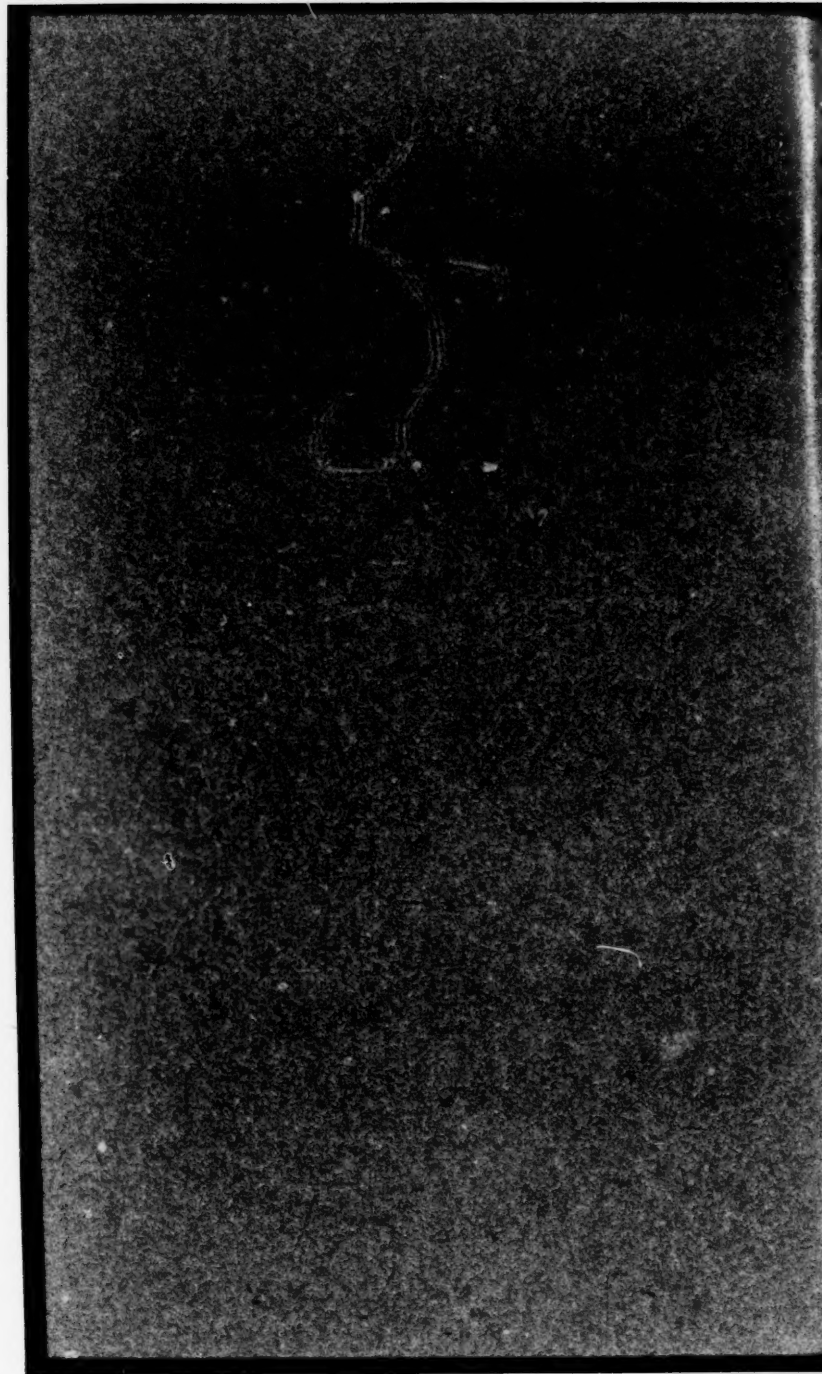
OCTOBER TERM, 1899.

SHIRLEY T. HIGH AND JAMES M.
High, appellants,

v.
F. E. COYNE, AS COLLECTOR OF
United States internal revenue for
the first district of Illinois, and
Ellen T. High, as executrix of
James L. High, deceased.

No. 225. Also
cases Nos. 387,
451, 458, and
459.

ADDITIONAL BRIEF FOR THE UNITED STATES ON
THE QUESTION SUBMITTED BY THE COURT.



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH AND JESSIE M. High, appellants, v. F. E. COYNE, AS COLLECTOR OF United States internal revenue for the first district of Illinois, and Ellen T. High, as executrix of James L. High, deceased.	}	No. 225. Also cases Nos. 387, 451, 458, and 459.
---	---	---

ADDITIONAL BRIEF FOR THE UNITED STATES ON THE QUESTION SUBMITTED BY THE COURT.

I.

The question which the court desires discussed is,
“Whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or by the amount of the legacy.”

Under the ruling of the Commissioner of Internal Revenue (promulgated without taking the advice of the

Attorney-General), the tax or duty is measured by the volume of the estate. The rates in the cases before the court were so fixed and the duties ascertained. Naturally, in my oral argument and in the briefs I have heretofore filed, I assumed that this construction was correct, and endeavored to show that the duty thus measured is a valid excise, uniform throughout the United States.

In the original briefs opposing counsel for the most part took the same view of the law, but there were some who suggested that the law might be construed so as to measure the duty by the amount of the legacy, and they discussed its validity in the light of that interpretation. Now all are united in strenuously insisting that the duty is measured by the volume of the estate. The reason is apparent. They infer from the order of the court that the validity of the law, as viewed by the court, depends upon whether the duty is measured by the volume of the estate or by the amount of the legacy. They think if the first view is taken the law will fall, if the second the law will stand, and so they are naturally strong in the opinion that the first view is the only possible one. I can add nothing to the elaborate arguments they submit in favor of the construction which they think will inevitably invalidate the law. It occurs to me, however, that if they are right in their inference as to the present status of the question of the constitutionality of this measure, it may be well for me to present to the court, by way of suggestion, certain considerations in support of the construction that the duty is measured by the amount of the legacy. If the mode of measuring the

duty *is* vital (which I do not believe), and if the act can reasonably be construed so as to sustain instead of defeat it, the court will so construe it.

II.

The graduated rate was added to the bill in the Senate, Mr. Wolcott having charge of the amendment. Counsel have printed in their briefs extracts from the discussion in the Senate on May 20, 1898. It appears from these extracts that Mr. Lodge pointed out what he regarded as the unfairness of grading the tax according to the volume of the estate instead of the amount of the legacy. Mr. Chandler inquired whether the limitation as to the amount applied to the estate or to the legacy and was assured by Mr. Wolcott that it applied to the estate, and that where the estate exceeds in value \$10,000 every legacy would have to pay, however small or large. No doubt Mr. Wolcott spoke in good faith, but he was not authorized to speak for Congress. The amendment introducing the graduated rate was adopted by the Senate and afterwards concurred in by the House, and the bill became a law. Now, what Congress intended in enacting this law can properly be determined only by the language of the law itself. A member who votes intelligently for a measure votes because of what *he* believes the language means, not because of what some other member says it means. Members disagree as to the construction of a measure and yet unite in voting for it, each believing that the courts will sustain his view of it. So, after all, the question of construction is one for the court, to be determined from the language used.

In the recent case of *Maxwell v. Dow*, decided February 26, 1900, Mr. Justice Peckham, speaking for the court, said :

What individual Senators or Representatives may have urged in debate in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. (*United States v. Trans-Missouri Freight Association*, 166 U. S., 290, 318; *Dunlap v. United States*, 173 U. S., 65, 75.)

III.

In Great Britain and in many of the British possessions, as the court will see by a reference to the appendix printed in my brief in reply to that of Evarts, Choate & Beaman, the estate duty is kept separate from the legacy tax. Each is graded, the duty on estates according to the volume of the estate, and that on legacies according to the amount of each legacy. The estate duty is applied usually to the clear value of the entire estate, real and personal. But this is not always done. In Canada the value of the estate, as well as the amount of the individual legacy, is used in determining whether the succession tax shall be levied in any particular case and the rate and amount when levied. I refer particularly to the succession duties in Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and British Columbia.

IV.

The act of June 30, 1864, contained in the beginning of section 124 a limitation, as follows: "Where the whole

amount of such personal property, as aforesaid, shall exceed the sum of one thousand dollars in actual value." This limitation in the enforcement of the law was held to apply to the total value of the legacies or distributive shares; in other words, to the volume of the estate. These words of limitation are retained in the present law, the amount being changed from \$1,000 to \$10,000. The retention of the clause was, however, unnecessary after the insertion of the provisions for the graduated rate. If it conflicts with the new matter providing for the graduated rate, the court may reject it. At any rate, it is surplusage, for the provisions for the graduated rate cover the whole matter, whether such rate is based upon the volume of the estate or the amount of the legacy.

In support of the construction that the rate is measured by the amount of the legacy, I direct the court's attention to the fact that *section 29, read as a whole, provides the method for determining a single duty or tax, namely, the duty or tax upon one legacy, share or transfer.* The person or persons having in charge or trust any legacies or shares arising from personal property, passing either by will or by the intestate laws, or any personal property or interest therein, transferred by deed or gift to take effect after the death of the grantor, are made subject "to a duty or tax, to be paid to the United States, as follows," and then follows the method for ascertaining the duty or tax, which I shall take up a little later. I stop here to note that counsel who attack the law all ignore or reject the provision, "or personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect, in

possession or enjoyment, after the death of the grantor or bargainor." Yet this clause is inserted in the body of the first paragraph, constitutes a part of it, and must be construed along with the rest of it. It is not only the person or persons in charge of legacies or distributive shares passing by will or the law of intestacy, but also the person or persons in charge of any personal property or interest therein transferred by deed or gift intended to take effect after death, who are made subject to the duty or tax. The subsequent limitations and provisions regulating the ascertainment of the duty or tax therefore apply as well to property transferred by deed to take effect after death as to property transmitted by will or intestate laws.

After providing that any person or persons in charge of any legacies or shares passing by will or by intestate laws, or any personal property or interest therein transferred by deed to take effect after death, to any person or persons, shall be made subject to "a duty or tax to be paid to the United States, as follows," the section proceeds:

Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property, etc.

This is *one* provision, to be read together. It lays down the rule for ascertaining the duty or tax in a particular case which is defined by the amount of the personal property transferred and the degree of kinship of the beneficiary. Where the whole amount of said personal property shall exceed in value \$10,000 and shall not exceed in value the sum of \$25,000, and where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, the tax shall be at the rate of 75 cents for each and every \$100 of the clear value of such interest in such property. This can be read as a provision relating in each instance to the amount of the legacy and the kinship of the recipient.

It is said that if Congress had intended the limitation in amount to apply to the legacy or share, it would have said so, making the act read: "Where the amount of the legacy or distributive share shall exceed in value," etc. But this loses sight of the fact that the act also applies to "personal property or any interest therein" transferred by deed or gift to take effect after the death of the grantor or bargainer. The words "personal property" cover a "legacy" or "distributive share" or any "personal property or interest therein," but the words "legacy or distributive share" would not cover "personal property or any interest therein."

Again, it is said that the phrase "any beneficial interest in such property" is used to indicate the legacy as distinguished from the estate out of which it is payable, "beneficial interest" meaning the legacy, while "such

property" means the estate. The distinction thus sought to be drawn does not appeal strongly to me. A man who conveys property usually only conveys his right and title to and interest in the property. A beneficial interest in property may denote the entire ownership of the property or a partial ownership. "A legacy or distributive share arising from personal property" is personal property. "Any personal property or interest therein" is personal property. "A beneficial interest in personal property" is personal property. So that the words "the amount of said personal property" may as well be held to denote the legacy as the words "any beneficial interest in such property."

The succeeding clauses of section 29, numbered "second," "third," "fourth," and "fifth," furnish the rule for ascertaining the tax where the beneficiary stands in a remoter degree of kinship, the last clause (fifth) containing the exemption from tax or duty of "legacies or property passing by will, or by the laws of any State or Territory, to husband or wife." Then follows the further provision for the graduated rate:

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thou-

sand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

It is to be observed that the word "whole" is here omitted before the word "amount." "Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half," etc. What is the "said property?" Evidently the "personal property" referred to in the primary provision for ascertaining the initial rate under the graduated scale, which is that "where the whole amount of said personal property shall exceed in value ten thousand dollars, and shall not exceed in value the sum of twenty-five thousand dollars," and the beneficiary shall stand in a certain degree of kinship to the decedent, the tax shall be at a certain rate. In other words, the initial rate is determined by the amount of the personal property which passes or is transferred, not by the volume of the estate left, combined with the degree of kinship of the person to whom it passes or is transferred, that is, the person entitled to a beneficial interest in it, and the subsequent rates are computed upon that, according to "the amount or value of said property;" that is, the property which passes to a particular person holding a certain relationship to the one who died possessed of the property.

V.

That the provisions of section 29 are directed toward ascertaining the amount of a single tax or duty assessed upon one legacy or distributive share passing to a person having a certain relationship to the one who died possessed of the property is supported by the opening provisions of section 30. This section provides "*that the tax or duty aforesaid*" shall be a lien and charge upon the property of the testator or decedent, and that every executor, etc., before distribution, shall pay to the collector "*the amount of the duty or tax assessed upon such legacy or distributive share,*" and shall also deliver to the collector a schedule "*of the amount of such legacy or distributive share, together with the amount of the duty which has accrued or shall accrue thereon.*"

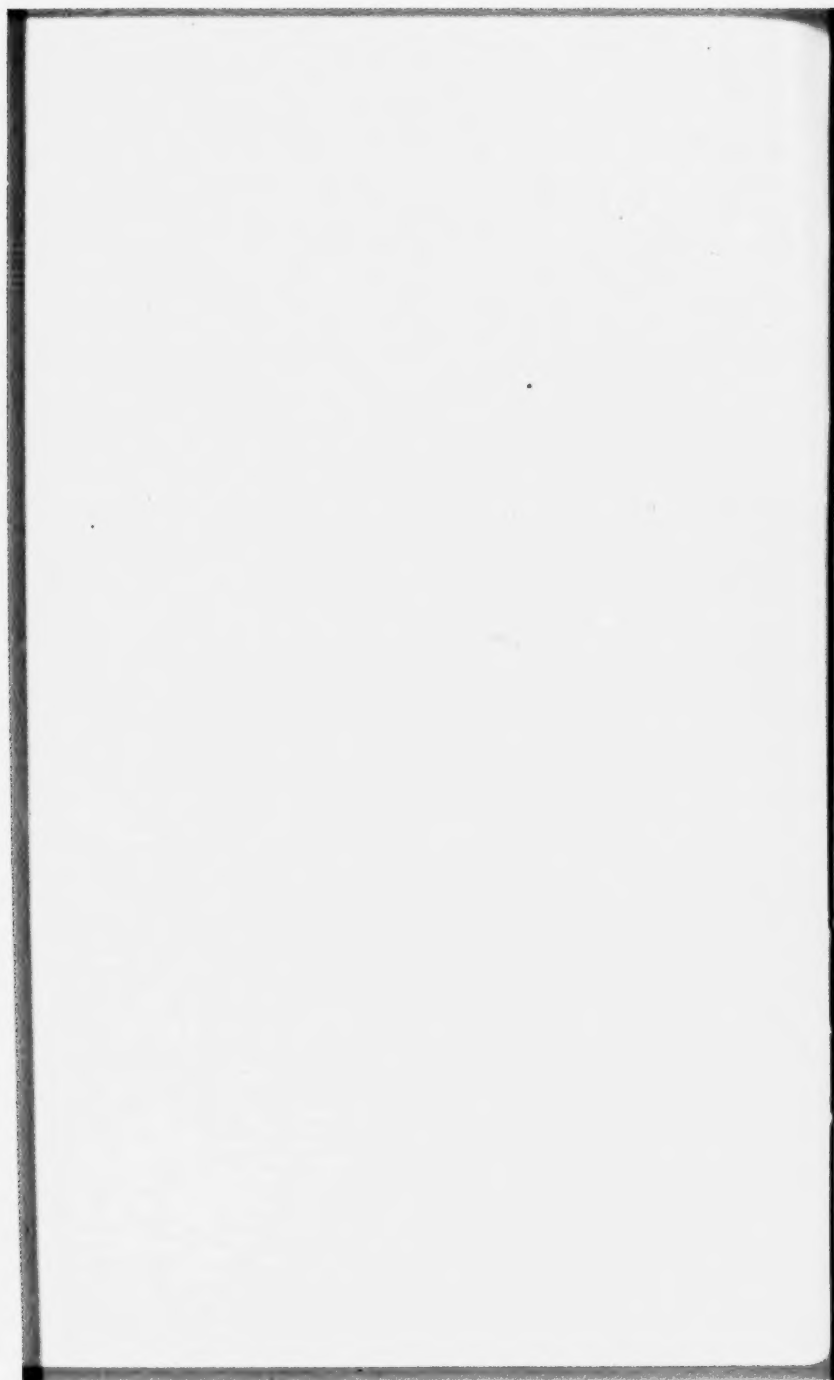
Further confirmation of this view is found in the opening provisions of section 125 of the act of 1864, as amended by the act of 1866, which are:

That *the tax or duty aforesaid* shall be due and payable whenever the party interested in *such legacy or distributive share or property or interest aforesaid* shall become entitled to the possession or enjoyment thereof or to the beneficial interest in the profits accruing therefrom, and the same shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States. And every administrator, executor, or trustee having in charge or trust *any legacy or distributive share* as aforesaid shall give notice thereof in writing to the assessor * * * within thirty days after he shall have

taken charge of such trust; and every executor, administrator, or trustee, before payment and distribution, * * * shall pay to the collector * * * the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the assessor * * * a schedule * * * of the amount of such legacy or distributive share, together with the amount of the duty which has accrued or shall accrue thereon.

JOHN K. RICHARDS,
Solicitor-General.

MARCH 15, 1900.



APPENDIX.

Sections 124 and 125 of the act of June 30, 1864 (13 Stat., 285), as amended by the act of July 13, 1866 (14 Stat., 140), as reenacted, with the addition of the graduated rate by sections 29 and 30 of the act of June 13, 1898 (30 Stat., 464).

The portions of the act of 1864, as amended in 1866, omitted in the act of 1898, are inclosed in brackets. The amendments made in 1866 to the act of 1864 are indicated by italics, while the amendments and additions made in the recent act of 1898 are indicated by black type.

SEC. 29 [124]. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property, as aforesaid, shall exceed the sum of ten [one] thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United

States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of **seventy-five cents** [one dollar] for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be a descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of **one dollar and fifty cents** [two dollars] for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed, as aforesaid, at the rate of **three** [four] dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed, as aforesaid, at the rate of **four** [five] dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other

degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five [six] dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed, as aforesaid, shall be exempt from tax or duty: *[Provided further, That any legacy or share of personal property passing as aforesaid to a minor child of the person who died possessed as aforesaid shall be exempt from taxation under this section, unless such legacy or share shall exceed the sum of one thousand dollars, in which case the excess only above that sum shall be liable to such taxation.]*

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30 [125]. That the tax or duty aforesaid *[shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment*

thereof, or to the beneficial interest in the profits accruing therefrom, and the same] shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; [*and every administrator, executor, or trustee, having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof in writing to the assessor or assistant assessor of the district where the deceased grantor or bargainer last resided, within thirty days after he shall have taken charge of such trust;*] and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the **said collector** [assessor] or **deputy collector** [assistant assessor of the said district] a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector;

and upon such payment and delivery of such schedule, list, or statement, said collector or deputy collector shall grant to such person, paying such duty or tax, a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee, shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector [assessor] or deputy collector [assistant assessor] a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector [assistant assessor] shall make out such lists and valuation as in other cases of neglect or refusal,

and shall assess the duty thereon; [and in case of wilful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit. Any tax paid under the provisions of sections one hundred and twenty-four and one hundred and twenty-five shall be deducted from the particular legacy or distributive share on account of which the same is charged:] and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody,

any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector [assessor] or deputy collector [assistant assessor] of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: Provided, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be prima facie evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

EBEN J. KNOWLTON ET AL., EXECUTORS, plaintiffs in error, <i>v.</i> FRANK R. MOORE, UNITED STATES Collector of Internal Revenue.	}	No. 387.

GEORGE T. MURDOCK, AS EXECUTOR OF Jane H. Sherman, deceased, plaintiff in error, <i>v.</i> JOHN G. WARD, UNITED STATES COL- lector of Internal Revenue.	}	No. 458.

GEORGE D. SHERMAN, PLAINTIFF IN error, <i>v.</i> THE UNITED STATES.	}	No. 459.

ADDITIONAL BRIEF FOR THE UNITED STATES COLLECTORS.

I.

The rule in *McCulloch v. Maryland* is invoked against this tax. That rule went no farther than to exempt a government agent while employed in government work.

Government itself can not be taxed, the Federal by the State or the State by the Federal, nor can the agency or instrumentality of the one, while employed to carry its powers into operation, be taxed by the other. Now, because an instrumentality of government is a creature of government, it is insisted that all creatures of government are exempt. The fallacy of this argument is apparent. To be exempt, the creature of government must be its agency, employed in its work.

The exemption only applies to the means, agencies, and instrumentalities employed by government in the execution of its functions. In no case has it been held to extend to rights and privileges of a private nature, although conferred by the State or enjoyed under its protection. In disposing of his property after death, either by will or by descent, a citizen is not an instrumentality of the State, nor is he engaged in the work of the State. He has the protection of the State, he is employing the means provided by law to transfer his property to his successors, but he is not exercising a function of government. His action is personal; his ends private. This applies to those who take as well as those who give. I print in the appendix some cases in point, with extracts.

II.

It is said the United States can not tax the right or privilege of inheritance because it is created by the State by virtue of its "reserved powers," with the exercise of which the Federal Government can not interfere. The Constitution provides, in the tenth amendment, that "The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, the "reserved powers" of the State include all powers granted the State by its constitution which the Federal Constitution did not delegate to the United States nor prohibit to the States. The entire legislative, executive, and judicial powers of the State government as commonly exercised come within this definition. I concede the United State can not tax these powers or their exercise, or the means employed to execute them, but here the exemption stops. If every right or privilege created or regulated by the State under its "reserved powers" is exempt, then no right or privilege can be taxed by the General Government which it does not itself create or confer. Substantially every right and privilege enjoyed within a State under the protection of its laws would be exempt. If this contention is right, the entire system of internal revenue is wrong, for the United States has no power to go into the States for revenue except through the door of direct taxation, which practically is closed. I submit, this argument forgets that the Government of the United States is a government of the people, which operates within the States and throughout all of them, and is the supreme authority. It forgets that the citizens of the States are also citizens of the United States. It forgets that the rights and privileges conferred by the States are enjoyed under the protection of the United States. In the acquisition, management, and disposition of large estates,

usually invested in properties of an interstate character, the protection of the courts and officers of the United States is continually asked for, and as constantly furnished. Perhaps this is one reason why the privilege of transmitting the great estates is taxed at a higher rate.

III.

Because the United States can not regulate the privilege of inheritance, it is insisted it can not tax it. But the power to tax does not depend on the power to regulate. It is complete in itself. Nay, more, it carries with it the power to regulate as a means to tax. A government which may tax, may regulate to tax. And it does not matter if the tax and the regulations adopted to lay and collect it put an additional burden or restriction on the privilege conferred by the State under its power to regulate. Under the "reserved powers" the so-called "police power" is vested in the States. The regulation of innumerable occupations and privileges is thus granted to the States exclusively. Under this power the States regulate the liquor traffic, granting for a sum a license or privilege to engage in it, but this does not exempt the traffic from additional restriction by the United States under its power to tax. So the States grant franchises and privileges, not only to individuals to become incorporated, but to corporations to do business—in other words, enjoy their franchises in the States—and for this privilege exacts a price purely arbitrary. Because the State has exclusive power to deny or confer, exclude or admit, is the franchise or privilege when conferred exempt from Federal taxation?

Not at all. In Ohio insurance companies pay a franchise tax for the privilege of doing business in the State. They pay a second tax to the United States for the privilege of doing the same business. Many other illustrations might be given.

IV.

The tax is not a direct tax because it *is* an excise tax. The Constitution puts direct taxes in one class, and duties, imposts, and excises in another. If an exaction be either a duty, impost, or excise, it is not a direct tax, whatever the incidence of the imposition may be. The tax falls not on property, but upon its movement. It is not the possession but the passage of property determines the tax. The duty is therefore on the privilege involved in the movement or passage of the property, and not upon the property itself. All the decisions, State and Federal, are to this effect. The privilege may be looked at from two points of view—from the start or the finish, the beginning or the end of the movement. From the first, it is a privilege to dispose of property, by will or descent; from the second, the privilege to take or receive property so passing. The entire movement is the devolution of the estate, and the duty may be and frequently has been termed, comprehensively, a duty on such devolution. These things are sufficient in themselves to make this an excise.

To come under the definition of a direct tax in the income-tax cases, this must be shown to be either a tax on property or its income. It is neither. It is a tax on a

privilege, not on property. It has been so upheld in the States. It could not be upheld as a tax on property, for the result would be double taxation. The usual constitutional provision in the States is that property must be taxed by a uniform rule and according to its true value in money. There is an annual tax and an annual listing day. All property in the State on that day is listed and put on the duplicate. If after listing day the owner dies the tax is paid by the executor or administrator. If the estate is not distributed before the next listing day, the executor or administrator must return it for assessment and taxation. Thus every year the property, as property, pays its tax. An additional tax on the property, as property, would obviously violate the rule of uniformity. So inheritance taxes have been sustained and can only be sustained as privilege taxes, and privilege taxes are excise taxes.

It is insisted the tax is direct, because it is paid by the legatee and can not be shifted. If paid primarily and ultimately by the legatee, there would be force in the contention. But it is not paid primarily by the legatee. It is paid by the executor. But it is said the executor simply acts as an agent in paying the tax. Whose agent? The agent of the legatee? Not so. He acts as the agent of the decedent. He holds the estate as the representative of the decedent. In other words, he acts as the agent of the estate in course of administration. The tax is made a lien upon the whole estate. If the testator does not provide for its payment, the tax is deducted from the legacy when paid. If this is to be regarded as ultimate payment by the legatee (a view I can not concede as correct),

then the tax is shifted from the estate to the legacy—from the executor in charge of the whole to the legatee who receives a part.

V.

Conceding for the sake of the argument that this is an excise, it is contended it is not uniform "throughout the United States," because it only applies where property passes "either by will or by the intestate laws of any State or Territory," and therefore does not apply within the District of Columbia.

The act of June 30, 1864 (13 Stats., chap. 173, pp. 223 to 306), contains 182 sections and provides a complete system of internal revenue to support the Government, to pay interest on the public debt, and for other purposes. Sections 124 and 125 provide for a duty upon legacies and distributive shares of personal property in the precise language of the law before the court, with the exception of a change in the exemption and the addition of the progressive rate. The last section (182) of the act of June 30, 1864, provides:

That wherever the word "State" is used in this act, it shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out the provisions of this act.

This act, as subsequently amended, was carried into the Revised Statutes and became Title 35 (secs. 3140 to 3465), regulating the collection of internal revenue and including a provision for the collection of the taxes provided on legacies and successions (chap. 10, secs. 3438

to 3440). The first section of this title (sec. 3140) contains the provision of the last section (sec. 182) of the act of June 30, 1864, and requires that the word "State," when used in this title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out the provisions of this act.

Congress, in enacting the war revenue act of June 13, 1898 (30 Stats., 448), and in providing additional internal-revenue taxes, very properly added the provision in the closing section of the taxing portion of the act (sec. 31):

That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.

The effect of this was to apply to the act under consideration all the administrative, special, or stamp provisions of law included in Title 35 of the Revised Statutes regulating the collection of internal revenue. In other words, it virtually incorporated the existing law respecting legacies and distributive shares of personal property in Title 35, and hence made it subject to section 3140, defining and extending the word "States" so as to include the District of Columbia.

VI.

It is urged, with great insistence, that if the tax is an excise it is not uniform, because it does not tax all estates passing by will or descent at the same rate, but exempts some and taxes others unequally, making the

larger pay a higher rate than the smaller. The effect of this is to concede the tax is an excise and yet insist it be treated as a tax upon property. It is an attempt to apply to an excise the rule of property taxation, namely, that property must be taxed by a uniform rule and according to its true value in money.

The constitutional requirement is that "duties, imposts, and excises shall be uniform throughout the United States;" that is, shall have the same operation throughout the United States; that the imposition shall be the same in all parts of the country, not one thing in Massachusetts and another in South Carolina. The cases cited by the other side (*Loughborough v. Blake* and the *Head Money cases*), as well as many others, hold clearly that the uniformity required is geographical or territorial only. The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

But it is said that the principle of uniformity underlies all taxation, and that to comply with this fundamental rule there must be uniformity and equality among the taxpayers. This is so, but how does it help the other side? The uniformity or equality which underlies all taxation is that uniformity and equality which, under the Fourteenth Amendment, must underlie all legislation. This is uniformity or equality within the created classes. All persons similarly situated must be treated alike. To all is guaranteed the equal protection of the laws.

Under the power to regulate, there must be no arbitrary deprivation of life, liberty, or property, but equal protection to all under like circumstances in the enjoyment of their rights. Under the power to tax, property

may be classified for taxation at different rates, and legislation may be special either in the extent to which it operates or the object sought to be obtained. "It is enough that there is no discrimination in favor of one against another of the same class." (*Giozza v. Tiernan*, 148 U. S., 657, 662.)

Of course, where Congress acts solely under the taxing power, it must tax for revenue only, to raise money for a public purpose; it can not tax simply to regulate, to confiscate, to destroy. So limited, the power of Congress in laying duties, imposts and excises, is ample and absolute.

In selecting subjects for a duty, impost, or excise, Congress may use value as a basis for classification, but it does not follow that because value is so used the same rate must be levied whatever the value. Value may be used to classify and different rates may be levied upon classes thus formed. This is done in levying duties, imposts, and excises. Thus, for illustration, in Schedule K, "wool and manufactures of wool," of the tariff act of August 27, 1894, is the following paragraph:

280. On woolen and worsted yarns made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, valued at not more than forty cents per pound, thirty per centum ad valorem; valued at more than forty cents per pound, forty per centum ad valorem.

This method has been followed time out of mind. Thus, in the act of August 5, 1861 (12 Stat., 293), there occurs this provision:

On all silks valued at not over one dollar per square yard, thirty per centum ad valorem; on all

silks valued over one dollar per square yard, forty per centum ad valorem; on all silk velvets or velvets of which silk is the component material of chief value, valued at three dollars per square yard, or under, thirty per centum ad valorem; valued at over three dollars per square yard, forty per centum ad valorem.

In the levying of a duty or excise it does not follow because the property or privilege has value that the tax must be levied ratably according to the value of the property or privilege. If this tax be a property tax, it is clearly invalid. There is no need to inquire further. But if it be an excise, let it be tested by the rule of uniformity which applies to excise taxes. All excises in a sense are arbitrary. (*California v. Pacific Ry. Co.*, 127 U. S., 1, 41; *Home Insurance Co. v. New York*, 134 U. S., 599.) They rest within the discretion of the taxing power. The tax may be levied in lump or measured as the legislature prescribes. All franchises, privileges, and occupation taxes are of this sort. Thus in Ohio foreign insurance companies are taxed at two and one-half per cent on their gross receipts in Ohio for the privilege of doing business in the State. Express companies are taxed at two per cent on their receipts from Ohio business. Freight and equipment companies at one per cent on the proportion of their capital stock representing rolling stock used in the State. Sleeping-car companies, one per cent on the proportion of their capital stock representing cars used in the State. Railroads, street railroads, gas, electric-light, water, and pipe-line companies, one-half of one per cent on their gross receipts. The tax

in all these cases is essentially arbitrary. The legislature exacts whatever amount it deems just and expedient.

The tax being upon a privilege involved in the devolution of an estate, Congress properly classified the privileges, exempting those it thought ought not be made to pay, and classifying the others according to its view of their value and their ability to pay the excise imposed. If Congress had seen fit, it might have levied a specific sum on estates of a designated value, a certain amount on estates exceeding \$10,000 and not exceeding \$25,000, a larger sum on estates exceeding \$25,000 and not exceeding \$50,000, and so on. It chose not to levy a specific sum, but to grade the rate. There is no lack of authority among the great writers on political economy and the science of government in favor of such a progressive rate. One of the greatest of all, John Stuart Mill, who was not an advocate of socialism, says it seems to him "the principle of graduation (as it is called)—that is, of levying a larger percentage upon a larger sum would be both just and expedient as applied to legacy and inheritance duties." (*Principles of Political Economy*, book 5, chapter 2, section 3.)

Is it possible that Congress is without power to adjust and equalize taxation, placing the burdens where they will fall the lightest? I do not believe this court will say so. In the *Income Tax* cases Mr. Justice Brown said (158 U. S., 694): "If men who have an income or property beyond their pressing needs are not the ones to pay taxes, it is difficult to say who are." And Mr. Justice Jackson said (p. 705): "In the imposition of taxes

for the benefit of the Government, the burden thereof should be imposed upon those having the most *ability* to bear them." The burden should be adjusted to the relative strength of those who must bear it. As when two boys of unequal size carry water to the district school, the bucket is placed not in the middle of the stick, but nearer the big boy.

VII.

In Nos. 458 and 459, the *Murdock* and *Sherman* cases, it is stated that a large portion of the estate transmitted was invested in United States bonds, and the claim is made that this portion must be held exempt from taxation. No case is cited in support of the contention, but the argument is made that to exact the duty amounts to a dishonorable attempt on the part of the Government to escape the full payment of its lawful obligation, and to the extent of the tax there is a virtual repudiation of the promise to pay under the bonds.

This is not a tax upon property; but if it were, I fail to see why the United States might not tax property invested in its own bonds. States tax their own bonds along with other property unless they specially exempt them. It is a question of public policy. If the State makes no exemption, the creditor who buys the bonds is not deceived. (*Murray v. Charleston*, 96 U. S., 432, 446, 447; *People v. Home Ins. Co.*, 29 Cal., 533.) If he lives in the State or municipality, he pays less for them if they are taxable than he would if they were exempt. The Government of the United States has never agreed, so far as I know, not to tax property invested in its own

bonds. It has expressly prohibited the taxation of its bonds by any State or municipality or local authority. But this exemption would have followed from the decision of this court. The United States can not tax the bonds or agencies of a State, and neither can the State or its agencies tax the bonds of the United States. Yet, notwithstanding this constitutional and statutory prohibition, the States have invariably computed inheritance taxes upon the portion of estates invested in United States bonds. They have done this because an inheritance tax is not one upon property but upon a privilege, and the property is simply used as a measure of the value of the privilege taxed. A reference to a few cases makes this clear.

In *Strode v. Com.* (52 Pa., 181), decided in 1866, the validity of an inheritance tax levied upon United States bonds belonging to an estate which passed subject to the tax was sustained, the court holding that, the tax not being upon the property of an estate, but upon the right of succession to an estate, it mattered not if the property was partly composed of nontaxable securities.

In *Wallace v. Myers* (38 Fed. Rep., 184) it was held that, as the New York collateral inheritance tax of 1887 was not imposed on property but upon the privilege of inheritance, it mattered not if a portion of the estate was in United States bonds. The court, speaking by Wallace, judge, said (middle page, 185):

The bonds are the subject of the appraisal, but the privilege is the subject of the tax.

In the *Matter of Knoedler*, 140 N. Y., 377 (decided in December, 1893), it was held that the collateral inheritance tax applied to money collected on life-insurance

policies, payable to the estate of the decedent. It was contended on behalf of the exemption of money collected on life-insurance policies from this tax, that it is only property which is liable to taxation under the general tax laws of the State which can be taxed under the act relating to taxable transfers, and that, inasmuch as life-insurance policies can not be included in the valuation of a taxpayer's property under the general law, they can not be considered in assessing a tax under the collateral inheritance law. Upon this point the court, by Maynard, judge, says (bottom p. 380):

The main premise upon which this proposition rests is manifestly inadmissible. The taxable transfer law has no reference or relation to the general law. The two acts are not *in pari materia*. While the object of both is to raise revenue for the support of the Government, they have nothing else in common. Nearly sixty years intervened between the passage of the earlier and the later statute, and the latter was enacted under different conditions from the former. It proceeds upon a new theory of the right of the Government to tax, and establishes a new system of taxation. It taxes the right of succession to property, and measures the tax in the method specifically prescribed. All property having an appraisable value must be considered, whether it is such as might be taxed under the general law or not. Many kinds of property might be enumerated which are not assessable under the general law, but which are appraisable under the collateral inheritance tax.

In the case of the *United States v. Perkins* (163 U. S., 625), decided in 1896, a New York inheritance tax computed on property bequeathed to the United States was

upheld, notwithstanding the fact that the property of the United States is not taxable by a State. Mr. Justice Brown, speaking for the court, said (p. 628):

The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.

Page 629:

That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held, both in New York and in several other States.

Page 630:

We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

See Dos Passos on Inheritance Tax Law (2d edition), section 27, page 59, and cases there cited.

VIII.

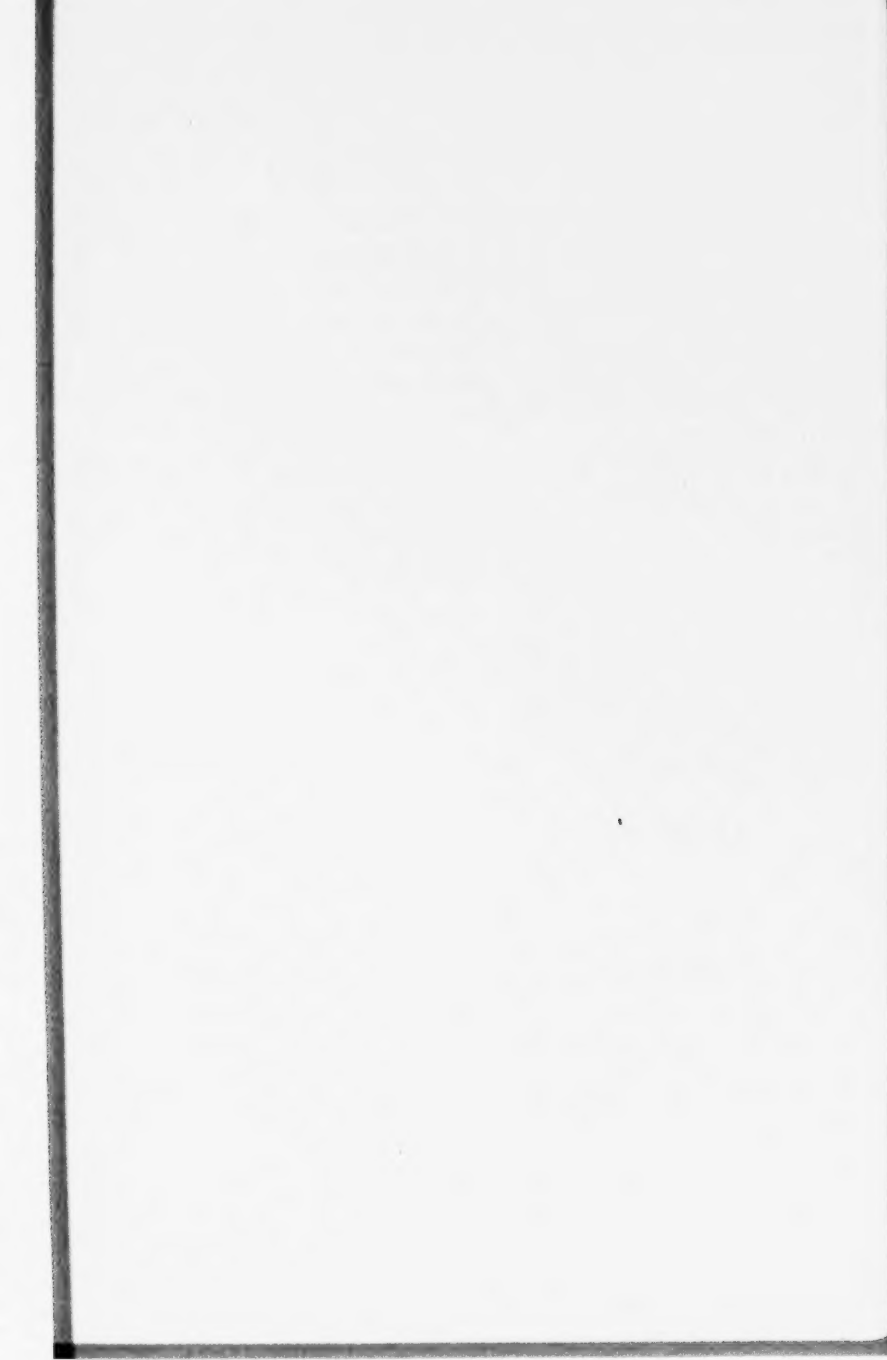
On pages 36 and 37 of Mr. Patterson's brief in Nos. 458 and 459 a ruling of the Treasury Department made December 23, 1898, is printed to show that the whole amount of personal property, before deducting debts or expenses, determines the rate of taxation. This construction was erroneous and was corrected by ruling No.

20587, which holds that "The whole amount of personal property left for distribution, after payment of the legal debts and expenses, determines the rate of tax imposed on legacies and distributive shares, without regard to the amount or value of each legacy or share."

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 13, 1899.

11096—2



APPENDIX.

INSTRUMENTALITIES OF GOVERNMENT.

In *McCulloch v. Maryland* (4 Wheaton, 316) it was held that the State of Maryland could not tax a branch of a bank of the United States. While the court held that the State could not tax a bank as an agency of the Government, it might tax the real property of the bank or the interests which citizens of the State might hold in the bank. The inhibited tax was one on the operations of the bank, consequently one on the operation of an instrument employed by the Government of the Union to carry its powers into execution.

Page 432:

"If the States may tax one instrument, employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the Government, to an excess which would defeat all the ends of Government. This was not intended by the American people. They did not design to make their Government dependent on the States."

In *Weston v. Charleston* (2 Peters, 449), this court, speaking by Mr. Chief Justice Marshall, held that a

State could not tax stock issued for loans made to the United States. The Constitution having conferred upon Congress the power to borrow money, the court held that this power could not be abridged by the States through taxing the stock or bonds which evidenced the loan.

National Bank v. Commonwealth (9 Wall., 353). Kentucky case on shares of national bank upheld. Miller, J. (p. 362), defining limitation on rule in *McCulloch* case:

"The agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government."

The converse is true.

"They (the banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law."

The converse is true with respect to estates in the acquisition and control of property; one is protected by the United States as well as the State law.

Veazie Bank v. Fenno (8 Wall., 533). Ten per cent tax on notes of State banks sustained. Chase, Chief Justice, after saying "the tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties," says (p. 547):

"It may be admitted that the *reserved rights* of the States, such as the right to pass laws, to give

effect to laws through Executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects for the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some *reserved power* of a State, seem to be as properly objects of taxation as any other property."

The "reserved powers" referred to near the close of this extract is one of "the reserved rights" spoken of above. A franchise conferred for a governmental purpose may be exempt while performing governmental work.

In *Collector v. Day* (11 Wall., 113) it was held that the Federal income tax could not be lawfully imposed upon the salary of a judicial officer of a State. Before this time, in *Dobbins v. Comm'rs of Erie County* (16 Peters, 435), it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. This was on the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the Government. The same rule was applied in the *Dobbins* case.

Nelson, J. (p. 127):

"And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are, necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation?"

Bradley, J., dissenting (p. 129):

"Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I can not but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as anyone can be to any interference by the General Government with the just powers of the State governments. But no concession of any of the just powers of the General Government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made."

In *United States v. Railroad Company* (17 Wall., 322), it was held that the Federal tax on the interest of the bonds of a railroad company (the Baltimore and Ohio), which the company collected from its creditors, could not be imposed with respect to bonds held by the city of Baltimore, because to sustain such a tax would be to tax a municipality which is an agency or instrumentality of the State.

Hunt, J. (page 327):

"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it

an exemption of those agencies and instruments, from the taxing power of the Federal Government."

Clifford and Miller, JJ., dissented, holding that the property of a municipality may be taxed, although the means and instrumentalities for conducting the public affairs of the city are exempt.

In *Lane County v. Oregon* (7 Wall., 71), held a State may require taxes to be paid in gold and silver coin.

Chase, Chief Justice (p. 77):

"In respect, however, to property, business, and persons, within their (the State) respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress."

In *Railroad Co. v. Peniston* (18 Wall., 5), State taxation of the property of the Union Pacific Railroad Company was sustained, although that corporation was

chartered by Congress in part for Government purposes. The above extract from *Lake Co. v. Oregon*, quoted and approved (p. 29).

Strong, J. (bottom p. 36):

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Bradley and Field dissent, holding the property non-taxable. In their opinion the following distinction is made between State and Federal taxation (bottom p. 48):

"But, it may asked, if the States can not tax a United States corporation created for public and national purposes, on what principle can the General Government tax local corporations created by the State governments for local and State purposes? If the States can not tax a national bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice Marshall in *McCulloch v. Maryland* (4 Wheaton, 405): 'The government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers

are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them."

Again:

"It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States would equally sustain the right of the States to tax banks chartered by the General Government. But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the State, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole and part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

California v. Pacific Railroad Co. (127 U. S., 1):
Held, that the franchise of the Pacific Railroad Company

could not be taxed. This was on the ground that the franchises were granted for national purposes. The case is not authority with respect to the taxation of a franchise granted for private ends. Moreover, the definition of a franchise given by Mr. Justice Bradley would not apply to the privilege of transmitting property by will or descent. The case is important in defining the arbitrary and unlimited power of taxation of franchises, and (ergo) of privileges.

Page 40 :

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends."

Page 41 :

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases."